Supreme Court, U.S.
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No. 98-1541

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

EVE BRUNEAU, A Minor, By and Through Her Guardians Ad Litem, PAT SCHOFIELD and JOHN BRUNEAU,

Petitioner,

v.

SOUTH KORTRIGHT CENTRAL SCHOOL DISTRICT and SOUTH KORTRIGHT SCHOOL BOARD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner Eve Bruneau began the 1993-94 school year as a student in William Parker's sixth grade class in the South Kortright Central School District. She turned 12 years old in November 1993.

Petitioner asserted that she was the victim of sexual harassment by boys in her class during the 1993-94 school year. This allegedly involved name calling and teasing. She claimed that this harassment created an intimidating, abusive and hostile learning environment, which interfered with her education and caused her to feel depressed.

On one particular occasion in October, 1993, Petitioner was upset by a particular remark by a boy in her class. Petitioner's mother, Patricia Schofield, reported the incident to Parker, her daughter's teacher, during a regularly scheduled parent-teacher conference on November 3, 1993. The teacher expressed his concern and assured Schofield this type of behavior would not reoccur. Eventually, Parker got the boy to apologize to Petitioner, after which the teacher extended words of comfort to her.

Meanwhile, Schofield approached Ann Cole during a class field trip. Cole, who at the time was completing a Master's Degree in Education Counseling, interned as a guidance counselor-in-training at the District. Cole thereafter met with girls from Parker's class to investigate Schofield's complaints. Having learned that some of the sixth grade boys teased the girls, Cole contacted Parker. On November 16, 1993 the girls, including Petitioner, took turns describing various incidents to Parker. At the meeting's conclusion, Parker vowed to remedy the situation by moving the students'

desks around and taking other actions such as providing lessons in appropriate behavior and the like.

Displeased with Parker's efforts, Schofield met on November 19, 1993 with Lynda Race, the District's assistant superintendent, to inform her of the situation in the sixth grade classroom. During that meeting, she reported Petitioner's and the other girls' complaints about the boys' behavior and Parker's response.

Race claims that her November 1993 meetings with Mrs. Schofield were primarily concerned with the school district's discontinuance of the accelerated mathematics program. During the course of that meeting, Schofield did bring to Race's attention the incident in which the Petitioner claimed that she was referred to as an "ugly dog faced bitch" and that the Petitioner claimed she had been excluded from several class projects. Race contends Schofield asked her to address these problems and Race complied. Race claims that nothing further was asked of her and that Schofield appeared satisfied with the response. Race denied that she ever disregarded or ignored any complaints made by the Petitioner, her mother or anyone else in regard to alleged sexual harassment.

Parker contended that, other than the Petitioner's complaint filed in federal court, he never heard Petitioner, Schofield, or any other student or parent allege that there was sexual harassment occurring in his classroom. Further, the District also employed Donna Chinchin, a certified teacher, in the same classroom, as an assistant to a disabled student. She too denied observing any sexual harassment or the like. Further, *nine* students from the same class testified at the trial that no sexual harassment occurred in Mr. Parker's class. He did not observe any sexual activity between any

children and did not believe that sexual harassment occurred in his classroom. Parker testified that there was no situation, of which he was aware, that he did not address a student's misbehavior when it was brought to his attention or when he observed it.

During the November 16, 1993 meeting between Parker, his students and Ann Cole, a Counselor intern, neither the Petitioner nor the other girls in his class informed him that they were being sexually harassed. The only episodes of mistreatment by the male classmates described at the meeting were descriptions of the boys not allowing them to participate with the boys in various playground activities. The girls also reported pushing, shoving and horseplay, typical sixth grade behavior.

Petitioner claims that the boys' behavior continued and, in fact, worsened in early 1994.

Schofield met with Race again on Friday, March 25, 1994 to follow up their earlier November 19, 1993 meeting. No other meetings between Race and Schofield occurred. Petitioner and her father also were present. Schofield asked that her daughter be removed from Parker's class and transferred to the other sixth grade class at the School. Race advised Schofield that only the school board could transfer Petitioner, under those conditions, particularly since it was so late in the school year.

That evening, Schofield visited the home of Richard Stinson, the school board vice president. She talked with Stinson about the boys' behavior in Parker's classroom. Schofield informed Stinson of her request to transfer Petitioner and the substance of Race's response. A board

meeting was to be held on the evening of Monday, March 28, 1994. Stinson conveyed Ms. Schofield's request to the Board.

The following Monday, March 28, 1994 Schofield and her husband took matters into their own hands. They went to the school at approximately 8:00 a.m., and she informed Parker that Petitioner would no longer be in his class. Schofield collected her daughter's books and brought them over to the other sixth grade class. Upon discovering Schofield's actions, Race insisted that Petitioner return to Parker's class and follow Board Procedure for a proper transfer request. Later that day, the Board of Education met and denied Ms. Schofield's request for a transfer, due to the potential disruption to the educational process and the fact that only three months remained in the school year. Petitioner and her parents decided that she would withdraw from the District and enter Stamford Central School District, located in a neighboring community where Petitioner and her family actually resided.

The March 25, 1994 complaint to Race was made only one school day prior to the Petitioner's transfer from the District.

Petitioner at no time made any written complaint alleging that the acts of sexual harassment perpetrated by fellow students were ignored by school district officials, nor filed a complaint pursuant to the District's Title IX policy during the time frame referenced by the Petitioner's federal court complaint.

Petitioner initially brought the instant action in the United States District Court for the Northern District of New York on July 13, 1994, seeking declaratory, injunctive and monetary relief. Following Respondent's Motion under Rule

Fed. R. Civ. P. 12(b)(6), on December 27, 1994 Petitioner filed an amended complaint, which named the District, Lynda Race, William Parker and the South Kortright School Board as defendants. Her amended complaint set forth two causes of action against the Respondents. First, Petitioner asserted a claim under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, against only the District for failing to remedy the hostile environment created by peer-on-peer sexual harassment. Second, Petitioner alleged a 42 U.S.C. § 1983 claim against all the Respondents. As part of her § 1983 claim, she averred that Respondents denied her right to be free from a hostile educational environment as guaranteed by Title IX and her right to equal protection under the Fourteenth Amendment of the Constitution.

On June 12, 1996 Respondents moved for summary judgment and the dismissal of Petitioner's amended complaint. Chief Judge Thomas J. McAvoy granted partial summary judgment in favor of Respondents, dismissing the § 1983 claims in their entirety. *Bruneau v. South Kortright Central School District*, 935 F. Supp. 162, 177-79 (N.D.N.Y. 1996). The district court ruled that Title IX subsumed Petitioner's § 1983 claim, finding that Congress intended to preclude a § 1983 remedy for Title IX violations. Moreover, the district court ruled that even if Petitioner's § 1983 claim were sustained, Race and Parker would be entitled to qualified immunity because whether peer-on-peer sexual harassment, in a school setting, violated Title IX was not clearly established at the time of the alleged events in the complaint.

Respondents' motion for summary judgment on Petitioner's Title IX claim was denied because various material issues of fact were present. The case proceeded to a jury trial before District Judge Lawrence Kahn. The trial,

which spanned 14 days, resulted in a unanimous verdict against the Petitioner and in favor of the Respondent School District and School Board.

The trial court issued a general verdict form, directing the jury to find for either Petitioner or the District as requested by Petitioner, over the objections of the Respondent. The District earlier had requested a special verdict form be used to permit the jury to address each of the six individual elements of the Title IX claim. Petitioner's counsel, however, objected and urged the use of the trial court's proposed general verdict form. The jury returned a general verdict in favor of the School on November 21, 1996 and judgment was entered accordingly on November 25, 1996. Petitioner moved pursuant to Fed. R. Civ. P. 59 to set aside the verdict and judgment, and grant a new trial. That motion was denied. *Bruneau v. South Kortright Central School District*, 962 F. Supp. 301 (N.D.N.Y. 1997).

The Court of Appeals for the Second Circuit affirmed the order dismissing Petitioner's § 1983 claim in its entirety and the judgment following trial on the Title IX claim. The court held that Title IX subsumes Bruneau's § 1983 claim against the District. Because the Court of Appeals held that Parker and Race were entitled to qualified immunity, the court did not determine whether Title IX subsumes a § 1983 claim against individual state actors in a school setting. *Bruneau v. South Kortright Central School District*, 163 F.3d 749 (2d Cir. 1998).

REASONS FOR DENYING THE WRIT

I.

THE DISPOSITION OF THIS CASE DOES NOT DEPEND ON HOW THE COURT DECIDES *DAVIS v. MONROE COUNTY BOARD OF EDUCATION* BECAUSE PETITIONER'S CLAIMS OF HARASSMENT WERE RENDERED MOOT BY THE JURY'S VERDICT.

The Supreme Court has granted certiorari in *Davis v. Monroe County Board of Education*, 120 F.3d 1390 (11th Cir. 1997), *cert. granted*, 119 S. Ct. 29 (1998) and recently heard argument therein. *Davis* poses the question of whether a student can even bring a civil action against a school district for alleged peer-on-peer sexual harassment.

Petitioner contends that if the Court decides in favor of Davis, then the Court should grant certiorari in this case. (*See* Petitioner's Brief Pages 3-4). Alternatively, Petitioner argues that if the Court decides in favor of the Monroe County Board of Education, and holds that there is no Title IX cause of action, then Petitioner has a valid § 1983 claim because it could not have been subsumed by a Title IX claim.

However, in reality, regardless of how the Court decides the *Davis* case, the District respectfully submits that there would be no basis for granting Petitioner any relief. After a 14-day trial, the jury determined that Petitioner did not prove that she had been sexually harassed. Regardless of whether Petitioner's arguments are couched in terms of a Title IX or a § 1983 theory of liability, the fact remains that Petitioner cannot prove any liability on the part of the Respondents. It would be an unfortunate waste of the resources of the judicial

system and the parties, to remand this case for a new trial, when the outcome has already been conclusively decided. Indeed, the Respondents' lack of liability for sexual harassment is *res judicata*.

The Title IX theory presented to the jury and the § 1983 claim which the court below dismissed are grounded on the same basic set of facts. The amended complaint states:

> Defendants have discriminated against plaintiff in the educational activities and programs of the South Kortright School on the basis of her sex in violation of the Fourteenth Amendment of the United States Constitution and 42 U.S.C. § 1983. All defendants had a duty to provide and ensure an educational environment for the Plaintiff, free of sexual innuendo, intimidation and discriminatory animus, and to enforce the rules, regulations, and laws necessary to protect her and other female students from acts of sexual harassment.

First Am. Compl. ¶ 55.

Essentially, Petitioner alleges the Respondents violated her Equal Protection rights by failing to remedy the situation at the School. Therefore, her § 1983 claim is based on the same factual predicate as her Title IX claim.

One of the decisions that the jury had to reach in this case, was whether the alleged behavior of the boys in the classroom was directed at Petitioner because of her gender or was rather mere misbehavior without gender as a motivating factor. At trial, there was a considerable amount

of conflicting evidence on this question. The jury had an abundance of testimony to weigh in reaching its ultimate conclusion that Petitioner did not prove her case.

Petitioner asserted that false testimony of eight of her classmates prevented her from establishing the necessary elements that she suffered from an intimidating, hostile, abusive, or offensive educational environment. Petitioner did not offer any evidence that these witnesses testified falsely to support of her claims. It was reasonable for the jury to have concluded that the defense witnesses were more credible than Petitioner's witnesses.

The law is well settled that proof standards for proving a hostile environment sexual harassment claim under 42 U.S.C. § 1983 are the same as in cases under 42 U.S.C. § 2000-3 (Title VII), *Southard v. Texas Bd. of Criminal Justice*, 114 F.3d 539 (5th Cir. 1997) and Title IX, *Murray v. New York University College of Dentistry*, 57 F.3d 243, 248 (2d Cir. 1995). Thus, the jury's rejection of the Petitioner's claims of sexual harassment ends the viability of Petitioner's claims under 42 U.S.C. § 1983, as well.

II.

THE 42 U.S.C. § 1983 CLAIMS AGAINST THE INDIVIDUAL RESPONDENTS ARE MOOT.

There is no basis for allowing Petitioner to pursue § 1983 claims against the individual Respondents. The Court of Appeals did not find it necessary to address the extent to which Title IX subsumes a § 1983 claim against the individual Respondents Race and Parker because it agreed with the district court that, in any event, they would be entitled to qualified immunity. (*See* Petitioner's Appendix Page 12-a).

The court below held that it was not clearly established law in the fall of 1993 that a § 1983 claim could be stated against individual officials for failure to prevent peer sexual harassment among students. Thus, Respondents Race and Parker were entitled to a dismissal based on the defense of qualified immunity.

Thus, the § 1983 claims against both the municipality or individual Respondents are moot because the individuals are entitled to the qualified good faith immunity defense. Therefore, the Respondents respectfully submit that it would not be appropriate to grant certiorari for the purpose of determining whether Title IX bars the Petitioner from being able to pursue those claims. Even if the Court were to hold in favor of the Petitioner, she could not ultimately obtain any relief whatsoever on remand to the court below.

III.

THE COURT'S CONSIDERATION OF THIS MATTER FOR RESOLUTION OF CONFLICTING APPELLATE COURT DECISIONS IS INAPPROPRIATE.

Petitioner contends in her Petition for a Writ of Certiorari that with the decision of the United States Court of Appeals for the Second Circuit in this matter, there is currently a three-to-three split among the Federal Courts of Appeals as to whether Title IX subsumes a constitution based claim for discrimination brought pursuant to 42 U.S.C. § 1983, where both claims arise from the same set of facts. Petitioner asserts that this division warrants a grant of certiorari in this matter. However, consideration of this case for purposes of resolving the appellate conflict would be inappropriate. Because of the trial jury's rejection of Petitioner's Title IX hostile

environment sexual harassment cause of action, which is based upon the same set of facts her dismissed § 1983 claim is based upon, and is subject to the same set of proof standards, Petitioner would be precluded from recovering on her § 1983 based cause of action even if the Court should find that such claim is not subsumed by Title IX.

A. Hostile Environment Sexual Harassment Proof Standards

Proof standards for proving a hostile environment sexual harassment claim under 42 U.S.C. § 2000-e ("Title VII") are applicable to constitutionally based sexual harassment claims asserted by means of 42 U.S.C. § 1983 *Southard v. Texas Bd. of Criminal Justice*, 114 F.3d 539 (5th Cir. 1997); *Trautvetter v. Quick*, 916 F.2d 1140, 1149 (7th Cir. 1990); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 897 (1st Cir. 1988); *Risinger v. Ohio Bureau of Workers' Compensation*, 883 F.2d 475, 483 (6th Cir. 1989); *Jones v. Clinton*, 990 F. Supp. 657, 668 (E.D. Ark. 1998). The same Title VII proof standards apply to Title IX based hostile environment sexual harassment causes of action. *Brine v. University of Iowa*, 90 F.3d 271, 273 (7th Cir. 1996); *Murray v. New York University College of Dentistry*, 57 F.3d 243, 248 (2d Cir. 1995); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 897 (1st Cir. 1988); *Lowery v. Texas A & M University*, 11 F. Supp. 895, 911 (S.D. Texas 1998).

Petitioner's § 1983 and Title IX causes of action for hostile environment sexual harassment were based on the same set of facts. Both causes of action were subject to the same proof standards. The district court dismissed Petitioner's § 1983 cause of action, finding it to be subsumed in her Title IX cause of action. Petitioner's Title IX cause of action for hostile environment sexual harassment proceeded to trial.

At trial, the district court correctly instructed the jury as to the elements Petitioner had to prove to demonstrate liability for sexual harassment under Title IX. *Bruneau v. South Kortright Central School District*, 163 F.3d 749, 754 (2d Cir. 1998). The jury applied the trial court's instructions for establishing liability under Title IX for unlawful sexual harassment and returned a general verdict against Petitioner, apparently finding that she had failed to shoulder the proof burdens applicable to her hostile environment sexual harassment claim.[1] Those exact same proof burdens would have been applied to Petitioner's § 1983 cause of action had it gone to the jury. The jury's rejection of Petitioner's Title IX sexual harassment claim would have also required a rejection of Petitioner's dismissed § 1983 cause of action as it was based on the same set of facts and was subject to the same proof standards. *Sorlucco v. New York City Police Department*, 971 F.2d 864, 874 (2d Cir. 1992) (jury's finding of liability on plaintiff's § 1983 discrimination claim is determinative of Title VII claim based on the same facts); *Nilsen v. City of Moss Point*, 701 F.2d 556, 559-60 (5th Cir. 1983) (jury verdict as to § 1983 claim of discrimination carries a *res judicata* effect as to Petitioner's Title VII claim that is based on the same facts). In light of the jury's verdict as to Petitioner's Title IX claim, and the fact that Petitioner's § 1983 claim is based on the same facts and is subject to the same proof standards as her Title IX claim that was rejected by the jury, the parties are collaterally estopped from relitigating Respondent's liability for sexual harassment with regard to a § 1983 based claim, even if the Court should find that such claim is not subsumed within Petitioner's Title IX

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1. Petitioner requested a general verdict form, and opposed Respondents' request for a special verdict form that addressed each element of Petitioner's sexual harassment claim. 163 F.3d at 754.

sexual harassment claim. We contend that Petitioner's § 1983 argument in this application is rendered moot and academic. Accordingly, the instant matter is an inappropriate vehicle for resolving any appellate conflict as to whether a § 1983 sexual harassment claim is subsumed within a Title IX sexual harassment claim.

IV.

THE COURT OF APPEALS CORRECTLY APPLIED THE SUPREME COURT'S HOLDINGS IN *MIDDLESEX COUNTY SEWERAGE AUTHORITY v. NATIONAL SEA CLAMMERS ASSOCIATION* AND *SMITH v. ROBINSON.*

Petitioner asserts that in ruling that her constitution based sexual harassment claims were subsumed in her Title IX cause of action, the Court of Appeals erroneously applied Supreme Court doctrine set forth in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981). However, Respondents respectfully urge that the Court of Appeals correctly applied this Court's holding in *Sea Clammers,* and all other Supreme Court doctrine relevant to the issue of whether Congress intended Title IX to preclude a § 1983 cause of action for violations of Petitioner's constitutional right to an educational environment free of sexual harassment.

In *Sea Clammers,* this Court held that

> [w]hen the remedial devices provided in a particular statute are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983.

453 U.S. at 20, 101 S. Ct. at 2626. As instructed by *Sea Clammers,* the Court of Appeals analyzed the alternative remedies available to Petitioner to determine whether Congress intended to replace § 1983 as an available remedy for hostile environment sexual harassment of public school students. 163 F.3d at 757-758. The Court of Appeals found that Title IX established a complex administrative enforcement scheme to ensure compliance with its provisions. 163 F.3d at 756. In addition, the Court of Appeals noted that this Court ruled in *Cannon v. University of Chicago*, 441 U.S. 677, 99 S. Ct. 1946, 60 L. Ed. 560 (1977), that Title IX implicitly permitted individuals to bring private causes of action for a "full panoply of remedies including equitable relief and compensatory damages." 163 F.3d at 756. This private remedy was cited by the Court of Appeals as further evidence of a congressional intent to supplant a § 1983 remedy for sexual harassment that is also allegedly violative of Title IX.

In applying this Court's holding in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, the Court of Appeals acknowledged this Court's instruction in *Smith v. Robinson*, 468 U.S. 992 (1984), that the "crucial consideration" in determining whether a statutory cause of action precludes a § 1983 action "is what Congress intended." 163 F.3d at 757. In light of the comprehensive judicial and administrative remedies available to Petitioner to enforce her constitutional right to an educational environment free of sexual harassment, the Court of Appeals found that Congress had intended to supplant a § 1983 based remedy, explaining that:

> Congress intended Title IX to be the appropriate vehicle to protect all of plaintiff's rights arising

> in this situation as Title IX's enforcement scheme fully addresses her constitutional claims against the School District and School Board. Consequently, we hold that plaintiff may not maintain her § 1983 claim and thereby bypass the comprehensive remedial scheme created in Title IX.

163 F.3d 749, 758.

The Court of Appeals decision represents a correct application of this Court's holding in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981).

Petitioner further contends that the Court of Appeals failed to correctly apply this Court's decision in *Smith v. Robinson*, 468 U.S. 992 (1984). Petitioner asserts that *Smith v. Robinson* established a two-part test for determining whether a statutory cause of action preempts a § 1983 cause of action based on claims of constitutional deprivations, and that before the constitutionally-based cause of action will be preempted it must be established (1) that the constitutional claims and the statutory claims are "virtually identical," and (2) that Congress intended to strip plaintiffs of the constitutionally-based claims by the passage of a federal statute. Petitioner is in error in that *Smith v. Robinson* does not require that the constitutional claims and statutory claims be "virtually identical" before constitutional based causes of action can be held subsumed in statutory causes of action. In any event, the interests that Petitioner seeks to protect through both her Title IX and § 1983 claims, the right to a school environment free of sexual harassment, are identical, and Title IX's remedial scheme can fully protect those interests.

Further, the comprehensive nature Title IX's remedial scheme establishes Congress' intent to make Title IX the exclusive avenue for enforcing both statutory and constitution based rights to a learning environment free of sexual harassment.

In *Smith v. Robinson*, 468 U.S. 992, 1009 (1984), this Court ruled that Congress intended the Education of the Handicapped Act, 20 U.S.C. § 1400 *et. seq.* ("EHA"), to be the exclusive avenue through which a plaintiff could protect an entitlement to publicly financed special education. In its decision in *Smith v. Robinson* the Court correctly noted that the constitutional claims and statutory claims before it were "virtually identical." Petitioner would elevate the Court's "virtually identical" characterization to the status of a prerequisite for preemption of constitution based claims by statutory causes of action. However, this was not the holding of *Smith v. Robinson*. The Court did not create or apply a "virtually identical" test. Rather, it examined the EHA, its legislative history, and the enforcement mechanisms available to protect rights arising under the statute in determining that Congress intended the statute to be the "exclusive avenue" for protecting Petitioner's statutory and constitutional rights to an appropriate public education.

That is the same process the Court of Appeals engaged in the instant matter. The Court of Appeals reviewed in detail the "complex administrative enforcement scheme" available to ensure compliance with Title IX. It analyzed the breadth and scope of the judicial remedy available for enforcement of Title IX rights. 163 F.3d at 756-757. Taken together, the court found that these remedies established the "crucial consideration" described in *Smith v. Robinson* of a congressional intent to make Title IX the exclusive remedial avenue for remedying hostile environment sexual harassment in the public school setting.

The Court of Appeals correctly applied Supreme Court doctrine enunciated in both *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981), and *Smith v. Robinson*, 468 U.S. 992 (1984). It considered the appropriate factors for discerning Petitioner's contentions regarding the establishment of a "virtually identical" test by the Court's decision in *Smith v. Robinson*, 468 U.S. 992 (1984) are without merit. Accordingly, Petitioner's Petition for a Writ of Certiorari should be denied.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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